

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND JAMES
M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA
DEPARTMENT OF REVENUE, RESPONDENTS

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an Alabama waste disposal tax that applies only to waste generated outside of Alabama violates the Commerce Clause.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Chemical Waste Management, Inc. states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc. and Cemtech Management, Inc.

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BRIEF FOR THE PETITIONER**OPINIONS BELOW**

The opinion of the Supreme Court of Alabama (Pet. App. 1a-49a) is reported at 584 So. 2d 1367. The opinion of the Circuit Court of Montgomery County (Pet. App. 50a-96a) is unreported.

JURISDICTION

The judgments of the Supreme Court of Alabama were entered on July 11, 1991. Pet. App. 97a-101a. The petition for a writ of certiorari was filed on September 20, 1991, and was granted on January 27, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Alabama Act No. 90-326 is reprinted in its entirety at Pet. App. 102a-114a. The challenged provision of Act No. 90-326, which is codified at Ala. Code § 22-30B-2(b), provides:

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton.

STATEMENT

Petitioner Chemical Waste Management, Inc. ("CWM"), operates a commercial hazardous waste disposal facility located near the town of Emelle, Alabama ("the Emelle facility"), that is authorized to treat and dispose of hazardous waste under both federal and state law.¹ Most of the waste disposed of at the Emelle facility is generated in other states and moves in interstate commerce to Alabama for treatment and/or disposal.

For several years, the State of Alabama has been trying to prevent the Emelle facility from receiving and disposing of hazardous waste generated in other states. Alabama's efforts repeatedly have been rebuffed by the courts—until now. The State's latest assault on non-Alabama waste is a \$72 per ton dis-

¹ Generally, the term "hazardous waste" includes wastes that have specifically been "listed" as hazardous by the Environmental Protection Agency and, in addition, wastes that exhibit certain characteristics (specifically, ignitability, corrosivity, reactivity, or toxicity). See 40 C.F.R. §§ 261.3, 261.20-261.24, 261.30-261.33.

posal tax that, on its face, applies only to waste generated outside of Alabama that is disposed of at commercial hazardous waste disposal facilities within Alabama; waste generated in Alabama is not subject to the tax. The question presented in this case is whether this facially discriminatory tax violates the Commerce Clause.

1. *Regulatory Background.* The treatment and disposal of hazardous waste are strictly regulated under federal law. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. One of Congress's principal objectives in enacting the RCRA was to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). As the Eleventh Circuit has stated, "[t]he RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. . . . The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes." *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), cert. denied, 493 U.S. 991 (1989) (citations omitted).

Federal law recognizes that hazardous waste is an unavoidable by-product of virtually all industrial processes and that, for the foreseeable future, some

hazardous waste must be disposed of in landfills.² Congress in 1984 specified that land disposal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology," or in compliance with the applicable treatment standard, in order to reduce the waste's toxicity or mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. See generally 40 C.F.R. Part 268; 55 Fed. Reg. 22520, 22523 (1990).

The RCRA specifically provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925. In addition, the EPA has set forth in great detail (covering roughly 700 pages in the Code of Federal Regulations) standards for operation of hazardous waste treatment, storage, and disposal facilities. See 40 C.F.R. Parts 264-268. Among other things, the regulations prescribe location standards designed to ensure that facilities are not sited in geologically inappropriate locations. 40 C.F.R. § 264.18. They also specify design requirements. *E.g., id.* § 264.301. In addition, the regulations set standards for training of personnel (*id.* § 264.16), inspecting facilities (*id.* § 264.15), minimizing the likelihood of an emergency (*id.* §§ 264.30-264.37), and responding quickly in the event of an emergency (*id.* §§ 264.50-264.56).³

² For example, many hazardous wastes may be treated by incineration, but the resulting ash must be disposed of in a hazardous waste landfill.

³ Alabama also regulates waste disposal. For example, it requires a facility operator to obtain regulatory approval

The regulations make the facility operator responsible for ensuring the containment of hazardous waste disposed of at that site and for undertaking corrective action in the event of a release. 40 C.F.R. §§ 264.100-264.120. In addition, the operator must provide "financial assurances" demonstrating the availability of funds to cover the closure of the facility and post-closure care for 30 years as well as liability insurance for injuries to third parties. 40 C.F.R. §§ 264.140-264.147; see also 42 U.S.C. § 9607.⁴ Finally, in the event the foregoing resources prove inadequate, generators, brokers, and transporters of the waste disposed of at a hazardous waste disposal facility are jointly and severally liable for the costs of remedial action if hazardous waste is released from such a facility. 42 U.S.C. § 9607.

Federal law also comprehensively regulates the transportation of hazardous materials. See 49 U.S.C. App. §§ 1801-1819; 49 C.F.R. Parts 171-180 (1990). Among other things, these provisions require transporters of hazardous materials to register with and

prior to the disposal of each and every waste stream. Ala. Admin. Code r. 335-14-3-.08(3). And it has sought to add an additional layer of protection by requiring that personnel from the Alabama Department of Environmental Management "comprehensively monitor all commercial sites for the disposal of hazardous waste." Ala. Code § 22-30-4(b). This monitoring function includes, but is not limited to, "monitoring of transportation near the site, monitoring of testing procedures, monitoring of the unloading of wastes, monitoring of waste storage, monitoring of waste disposal and monitoring of on site and off site areas of known or suspected contamination." *Id.* § 22-30-4(b)(2). The cost of these functions is financed by a tax of \$1 per ton on waste disposed of at the commercial site. *Id.* § 22-30-4(b)(2).

⁴ Alabama requires similar financial assurances. See Ala. Admin. Code rr. 335-14-5-.08, 335-14-6-.08.

obtain safety permits from the Secretary of Transportation (49 U.S.C. App. § 1805) and set forth packaging requirements and specifications for shipping containers (49 C.F.R. §§ 173.300, 173.510; *id.* Part 178), procedures for loading and unloading (*id.* § 177.834), and procedures to be followed if a vehicle carrying hazardous materials becomes disabled or is involved in an accident or if a container holding hazardous materials leaks in transit (*id.* §§ 177.854-177.860). In addition, federal law requires transporters of hazardous materials to demonstrate financial responsibility of at least \$5 million to cover the cost of remediating any spill of such materials that may occur in transit. Pub. L. No. 101-615, § 23, 104 Stat. 3244, 3272 (1990).⁵

2. *The Interstate Hazardous Waste Market.* The hazardous waste market is manifestly interstate in nature. As discussed in detail in the amicus briefs filed at the petition stage by American Iron and Steel Institute ("AISI") *et al.*, and Hazardous Waste Treatment Council ("HWTC") *et al.*, the numerous types of hazardous wastes require a variety of treatment and disposal methods. Not every state has a facility appropriate for the treatment of all hazardous wastes generated there. Indeed, because of the diverse treatment and disposal processes required for different types of waste, the economies of scale asso-

⁵ Alabama also regulates the transportation of hazardous wastes. See Ala. Admin. Code r. 335-14-1. Among other things, it requires transporters of such wastes to take immediate action to protect human health and the environment in the event of a discharge during transportation (Ala. Admin. Code r. 335-14-1-.03(1)) and requires them to back up that commitment with certain mandatory financial assurances (*id.* at r. 335-14-1-.04).

ciated with each process, and the geologic and other characteristics necessary for construction of safe disposal facilities, no state could possibly provide for the safe disposal of every type of waste generated within its borders. There is accordingly an unavoidable need to ship wastes in interstate commerce. HWTC Br. 3-6; AISI Br. 10-11, 12-14.⁶

The average state sends hazardous wastes to 19 states and receives hazardous wastes from 19 states. AISI Br. 10. And, although it is a net importer of waste, Alabama sends over 50,000 tons of waste per year to a total of 23 other states. *Ibid.* Alabama, like virtually every state in the Union, cannot do without the interstate market for hazardous waste.

3. *The Emelle Facility.* CWM's Emelle facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls ("PCBs") at the facility. The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code § 22-30-12(i).

A substantial amount of the waste disposed of at the Emelle facility is generated in states other than Alabama and moves in interstate commerce to the Emelle facility. The trial court found that "[e]ighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state." Pet. App. 58a. Indeed, the facility plays a critical role in the safe

⁶ For example, only eight land disposal facilities in the country are authorized to dispose of polychlorinated biphenyls ("PCBs").

disposal of the Nation's hazardous waste. As the United States has observed, "Emelle is important from a nationwide perspective because it is the largest hazardous waste management facility in the United States and the ultimate depository for over one third of the waste materials shipped off-site from Superfund [cleanup] sites." Brief for the United States at 9, *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management* ("NSWMA"), 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S. Ct. 2800 (1991). See also AISI Br. 3, 7.

4. *Alabama's Efforts To Impede The Disposal Within The State Of Waste Generated In Other States.* Alabama's undisguised animosity toward interstate commerce in hazardous waste is well-documented. As early as 1987, Governor Hunt stated that he "wish[ed] to make it absolutely clear that we will take any and all action available to us to keep out-of-state waste out of Alabama." J.A. 57. Since then the State repeatedly has acted on the Governor's threat to use every means available to prevent the disposal within Alabama of hazardous waste generated in other states.

The State began its assault on interstate commerce in 1987 immediately after the EPA granted the Emelle facility a final permit under RCRA. The State and four citizens' organizations appealed the decision to the Administrator of the EPA, who refused to rescind the permit. They then appealed to the Eleventh Circuit, which affirmed the Administrator's decision upholding the granting of the permit. *Alabama ex rel. Siegelman v. United States Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990).

In 1988 Governor Hunt and other state officials initiated a second legal action, this time aimed at halting the cleanup of an abandoned waste site in Texas because the PCB waste was to be disposed of at the Emelle facility. This effort to stop the flow of waste at Alabama's borders, like the State's attempt to block the facility's operating permit, was rebuffed by the Eleventh Circuit. Though dismissing the case on standing and jurisdictional grounds, that court stated that "[t]o the extent plaintiffs * * * assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction." *Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1555 n.3.⁷

Undeterred by this latest rebuff, the Legislature enacted Ala. Act No. 89-788 (codified at Ala. Code § 22-30-11(b)) in May 1989. That measure, popularly known as the Holley Bill, barred any commercial hazardous waste disposal facility located in Alabama from treating or disposing of hazardous waste generated outside Alabama if the State in which the waste was generated either (1) prohibited the treatment or disposal of hazardous waste within its borders and had no hazardous waste treatment or disposal facility; or (2) had no facility within the State for the treatment or disposal of hazardous waste and had not entered into an interstate or regional waste disposal agreement to which Alabama was a signatory. CWM brought suit in federal court, and the Eleventh

⁷ The Eleventh Circuit subsequently questioned Alabama's "good faith" in bringing the action. *Alabama ex rel. Siegelman v. United States Environmental Protection Agency*, 925 F.2d 385, 390-391 n.6 (11th Cir. 1991).

Circuit ultimately held the statute invalid under the Commerce Clause. The court found that “[o]n its face, the Holley Bill discriminates among out-of-state waste generators and imposes on these generators the burden of conserving Alabama’s remaining hazardous waste disposal capacity.” *NSWMA*, 910 F.2d at 720. Because the statute “distinguish[ed] among wastes based on their origin, with no other basis for the distinction,” the Eleventh Circuit concluded that it violated the Commerce Clause. *Ibid.*

5. *The Challenged Statute.* In 1990, Alabama continued its assault on out-of-state waste by enacting Ala. Act No. 90-326 (codified at Ala. Code §§ 22-30B-1.1 *et seq.*), the statute at issue in this case. The Act imposes a fee of \$72 per ton (“the Additional Fee”), which is, by its express terms, limited to waste generated outside Alabama and disposed of at commercial hazardous waste disposal facilities within Alabama. Waste generated within Alabama and disposed of at such facilities is not subject to this tax. See Ala. Code § 22-30B-2(b).⁸ The Act also imposes a “Base Fee” of \$25.60 per ton on all waste disposed of at such facilities regardless of its origin. Finally, the Act contains a provision that restricts the amount of waste that can be disposed of at commercial hazardous waste disposal facilities during any

⁸ Specifically, the Additional Fee provision states:

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of \$72.00 per ton.

Ala. Code § 22-30B-2(b) (emphasis added).

one-year period (“the Cap Provision”).” The cap was fixed at the amount of waste received at such facilities during the year beginning July 15, 1990 (“the benchmark period”)—the day the new fees took effect. See *id.* § 22-30B-2.3.

Act No. 90-326 was intended to discourage the disposal of out-of-state waste in Alabama. During the Legislature’s consideration of the Act, Governor Hunt stated:

[W]e’ve got to do something to stop the flow of hazardous waste into the state, to force other states to get their incinerators and do [the] job that they ought to do and that we’ve got a right to expect them to do. I’d be tickled to death to get both that increase [in disposal fees] and the cap bill signed into law.

J.A. 63. Other state officials made similar pronouncements during the legislative proceedings. For example, the Director of the Alabama Department of Environmental Management (“ADEM”) testified before the Senate Finance and Taxation Committee that he hoped and expected that the law would substantially lower the amount of out-of-state waste disposed of in Alabama. J.A. 114 (Pegues Dep.).

When Governor Hunt signed Act No. 90-326 into law, he reiterated the discriminatory intention underlying the legislation, stating:

On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for

⁹ Alabama structured the Cap Provision to apply *only* to the Emelle facility by exempting all facilities that disposed of less than 100,000 tons of hazardous waste during the year beginning July 15, 1990.

only \$6 a ton. But today, Alabama is taking down the sale sign. With this law it's going to cost \$112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here.

J.A. 66.¹⁰ See also *ibid.* ("Today we will take an important step toward scratching Alabama's name off [the] list of favorite places to dump hazardous waste.").

6. *The Proceedings Below.* In May 1990, CWM commenced this action in Alabama circuit court challenging the Additional Fee, the Base Fee, and the Cap Provision on federal and state constitutional grounds.¹¹ Following a trial, the circuit court held that the Additional Fee violated the Commerce Clause, but rejected CWM's challenges to the other provisions.

The circuit court found that "the Additional Fee facially discriminates against waste generated in States other than Alabama * * *. By its very terms, the fee applies *only* to out-of-state waste. Waste generated within Alabama * * * is completely exempted from the Additional Fee." Pet. App. 85a (emphasis in original).

The circuit court determined that the detailed federal and state regulations applicable to hazardous waste might not eliminate all conceivable risks from the transportation and disposal of such substances.

¹⁰ In addition to the \$72 per ton Additional Fee and the \$25.60 per ton Base Fee, other provisions of Alabama law imposed exactions totalling \$14.40 per ton.

¹¹ CWM was barred from proceeding in federal court by the Tax Injunction Act, 28 U.S.C. § 1341.

For example, the court observed that "leachate"—the liquid resulting when rainwater or groundwater comes into contact with waste buried at a disposal site—may have migrated from some of the older (pre-RCRA) disposal trenches at the Emelle facility into the 700 foot thick layer of chalk that lies beneath those trenches. Pet. App. 60a.¹²

The circuit court also noted that "depending upon its severity, an earthquake could unseal cracks in the chalk and open avenues for the movement of leachate and hazardous wastes" and, in addition, referred to possible "risks" that might arise after CWM ends disposal activity at the Emelle facility. Pet. App. 62a, 63a.¹³ With respect to transportation of waste, the court stated that "[a]s in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment." *Id.* at 62a.

Despite its findings that some uncertainty is inherent in the management of hazardous waste, the trial court rejected the State's proffered environmental and safety justifications for singling out waste from other states:

[H]azardous waste generated in Alabama is just as dangerous as such waste generated in other

¹² However, it stated that "[t]here are widely varying estimates as to travel time" through the chalk; the possibilities range from 330 to 10,000 years. Pet. App. 60a. "Those transit time estimates all involve complicated calculations based upon highly variable factors." *Ibid.*

¹³ Notwithstanding these findings regarding contingent risks, even Governor Hunt recognizes that the Emelle facility is "probably one of the safest such facilities in the country." J.A. 66.

states. All of the safety and environmental concerns set forth at trial * * * apply with equal force to hazardous waste generated in and out of the State of Alabama. * * * This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Id. at 86a.

The circuit court made clear that Alabama remains free to address its environmental and safety concerns as long as it does so in a nondiscriminatory fashion. Thus, if the State wants to encourage production techniques that minimize the amount of waste generated, it can "impose a mandatory fee that falls evenhandedly on both in-state waste and out-of-state waste * * *." Pet. App. 87a. Alternatively, "the State could constitutionally charge a higher fee based on the degree of dangerousness [or] the nature of the waste * * *." *Id.* at 87a-88a. "What the Commerce Clause forbids is a significantly heavier burden that is imposed by the Additional Fee based on the origin of the waste." *Id.* at 88a.

The circuit court also concluded that the Additional Fee could not be justified on the ground that it imposes on out-of-state waste generators their fair share of the costs to Alabama of waste disposal facilities located within the State. The court found insufficient evidence that in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee and no evidence that the Fee equalized the burden on in-state and out-of-state generators. Pet. App. 88a n.6. For these reasons, the court concluded that the Additional Fee violates the Commerce Clause.

Turning to the question of the appropriate relief, the circuit court observed that "[i]f a state requires a taxpayer to pay a tax prior to obtaining a determination of its validity, the Due Process Clause * * * requires that a post-payment remedy be provided." Pet. App. 90a (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990)). It further stated that "[u]nder *McKesson* the past discrimination may be cured either by a refund, by a retroactive increase in the lower discriminatory tax rate, or by a combination of a partial refund and a partial retroactive increase." Pet. App. 90a. The court concluded that the decision as to the proper backward-looking remedy should in the first instance be made by the political branches. *Id.* at 91a. It therefore refrained from selecting a remedy, but retained jurisdiction in order to ensure that the discrimination actually is remedied consistent with *McKesson*. *Ibid.*

The circuit court went on to note that although it found no constitutional defect in the Cap Provision itself, the discriminatory Additional Fee had tainted the amount of the cap by depressing volumes during the benchmark period. Pet. App. 92a-93a. The court stated that this taint would be removed if the State were to remedy the discriminatory Additional Fee by retroactively imposing it on in-state waste. *Id.* at 93a. On the other hand,

if the remedy implemented involves payment of a refund, in whole or in part, then the Plaintiff's payments during the benchmark period will have been increased by an unconstitutional fee. In that event some form of relief, which may include establishment of a new benchmark period or an injunction against enforcement of a cap

which perpetuates the effects of discriminatory fees, will be necessary. * * * The volume cap for future years may not be based on a benchmark period which includes any time during which an unconstitutionally discriminatory fee was assessed.

Ibid. Accordingly, the court retained jurisdiction and indicated its intention to "entertain an appropriate motion by Plaintiff seeking such relief as may be necessary to remedy the discrimination in the event the State does not do so, including relief from the effect of discriminatory fees on the volume cap."

Ibid.

The Alabama Supreme Court reversed the circuit court's ruling that the Additional Fee is unconstitutional, while affirming the lower court's rejection of the challenges to the Base Fee and the Cap Provision. According to the state supreme court, this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment." Pet. App. 41a. The court found that the Additional Fee differed from the facially discriminatory bans on out-of-state waste invalidated in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *NSWMA* because it "has not been enacted for the purpose of economic protectionism." Pet. App. 44a. Based on the asserted inapplicability of those decisions, the court determined that the Additional Fee

serves these legitimate local purposes that cannot be adequately served by reasonable nondiscrim-

inatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

Ibid.

The state supreme court concluded that "[t]here is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available nondiscriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." Pet. App. 45a-46a.

Justice Houston concurred in the judgment. Pet. App. 48a-49a. He asserted that hazardous waste is not "an article of commerce protected by the Commerce Clause" and stated that the Alabama Supreme Court should not conclude otherwise until directed to by this Court. *Id.* at 48a.

CWM filed a petition for a writ of certiorari seeking review of the Alabama Supreme Court's rejection of the Commerce Clause challenges to the Additional Fee, the Base Fee, and the Cap Provision. This Court granted the petition only with respect to the Commerce Clause challenge to the Additional Fee.

SUMMARY OF ARGUMENT

The Framers of our Constitution sought to avoid the commercial rivalries among states that festered under the Articles of Confederation by mandating economic as well as political union. The Framers recognized that the states were in fact economically interdependent and that the Nation would therefore be strongest without artificial barriers obstructing commerce among the states. The Commerce Clause fosters this ideal by prohibiting the states from discriminating against goods originating in other states and from seeking to reserve privately-owned resources for their own citizens.

The facially discriminatory tax at issue here, and the Alabama Supreme Court's decision upholding it, comprise nothing less than a frontal assault on these basic Commerce Clause principles. The notion that Alabama may in effect erect an "interstate waste keep out" sign at the Emelle facility is grounded in the very parochialism that the Framers sought to eradicate. Indeed, the tax is constitutionally indistinguishable from the ban on disposal of interstate waste held to violate the Commerce Clause in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The \$72 per ton Additional Fee indisputably discriminates against out-of-state waste on its face. The court below nonetheless refused to invalidate it, asserting that discriminatory laws are entirely permissible as long as the state's purpose is not "protectionism." This Court definitively rejected that precise argument, however, in *City of Philadelphia*. The State's other justifications for the Additional Fee are similarly flawed.

Because the trial court found that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (Pet. App. 86a), the State's "health and safety" concerns cannot justify the discriminatory Additional Fee, just as this Court held that such concerns could not save the discriminatory statute in *City of Philadelphia*. Assuming that a tax is necessary to address potential health and safety concerns, an even-handed tax would *better* serve those goals than would a tax that falls only on waste from out of state.

Nor is discrimination an acceptable means of conserving disposal capacity. This Court already has made that clear in precisely this context, holding that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

The goal of ensuring that out-of-state generators contribute their fair share of future response costs is fully addressed by basing the fee on tonnage. Under a per-ton tax, out-of-state generators pay more taxes because they dispose of more tons of waste. A discriminatory fee does not ensure that they pay their fair share; it ensures that they pay an unfair share.

The related contention that the Additional Fee is a compensatory tax (and therefore is not really discriminatory) is equally misguided. This Court has accepted such a defense only when the challenged tax serves to complement a substantially equivalent tax borne by in-state interests. The State never has identified a substantially equivalent tax that is borne only by in-state waste generators.

Finally, a discriminatory *disposal* fee is far from necessary to address Alabama's transportation-related concerns. For one thing, federal and state law already comprehensively regulate transportation of hazardous waste; if those regulations are insufficient, they may be supplemented on an even-handed basis. Apart from regulation, an even-handed tax would be a better means of dealing with the State's purported concerns. Yet, Alabama does not apply a similar tax to waste generated in the State no matter how many miles it travels on Alabama roads. Plainly, the Additional Fee is neither the most effective nor the least discriminatory means of achieving Alabama's transportation-related objectives.

Because the Additional Fee fails to survive "the strictest scrutiny" required by this Court's precedents, the judgment of the Supreme Court of Alabama should be reversed. The Court should remand the case to allow CWM to obtain the backward-looking relief required by *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), including redress of the separate injury resulting from the fact that the permanent cap on annual disposal volume now applicable to the Emelle facility was based on disposal volumes that were artificially depressed by the unconstitutional fee.

ARGUMENT

THE FACIALLY DISCRIMINATORY \$72 PER TON ADDITIONAL FEE VIOLATES THE COMMERCE CLAUSE

A. Laws That Discriminate Against Interstate Commerce On Their Face Are Subject To A Virtually Per Se Rule Of Invalidity Under The Commerce Clause.

When this Nation's founders met to consider a Constitution, they were convinced that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979). From that conviction sprang the Commerce Clause, which granted Congress the power to regulate interstate commerce and curtailed the right of the States to do the same. *Id.* at 326. Accord *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). As this Court has recognized, "[n]o other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949).

The "very purpose" of the Commerce Clause was to establish "an area of free trade" among the states, by forbidding them to impose tariffs or other barriers against each other's products and trade. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). See also *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170 (1954); *H.P. Hood & Sons*, 336 U.S. at 537-539. Thus, for well over a century it has

been "settled that no State can, consistently with the Federal Constitution, impose upon the products of other States * * * more onerous public burdens or taxes than it imposes upon the like products of its own territory." *Guy v. City of Baltimore*, 100 U.S. 434, 439 (1880). See also *Walling v. Michigan*, 116 U.S. 446, 455 (1886) ("[a] discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States"); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) ("a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State").¹⁴

¹⁴ The Court has applied this anti-discrimination rule to strike down dozens of tax statutes that, like the Additional Fee, discriminated against interstate commerce on their face. Representative cases include *New Energy, supra* (provision awarding fuel dealers tax credit against Ohio fuel sales tax for each gallon of ethanol sold, but only if ethanol was produced in Ohio or in a state that grants similar tax advantages for Ohio ethanol); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232 (1987) (exemption from manufacturing tax available only for locally manufactured products sold within the state, not for locally manufactured products sold outside the state); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (exemption from liquor sales tax for two locally produced beverages); *Armco, supra* (provision exempting local manufacturers from gross receipts tax); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (franchise tax credit available only to extent products are shipped from within New York); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (series of exemptions from and credits against Louisiana first use and severance taxes for gas consumed or

Accordingly, facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes*, 441 U.S. at 337. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 800; *City of Philadelphia*, 437 U.S. at 624 ("where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected"). To the extent facial discrimination is not *per se* unconstitutional, the state's burden of justification is "high": the discriminatory statute must be invalidated unless the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. See also *Wyoming v. Oklahoma*, 112 S. Ct. at 800. A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337. As we now discuss, the Additional Fee fails this very strict test.

B. The Additional Fee Fails The Strict Scrutiny Test.

It is undisputed that the Additional Fee on its face discriminates against interstate commerce. The fee applies only to waste generated outside of Alabama

produced in Louisiana); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) (provisions of transfer tax on securities transactions that expressly accorded preferential tax treatment to in-state sales); *I.M. Darnell & Son v. City of Memphis*, 208 U.S. 113 (1908) (exemption from Tennessee property tax for Tennessee agricultural products, but not for agricultural products brought in from other states); *Walling, supra* (tax on liquors produced out-of-state and sold in-state); *Guy, supra* (user fee imposed on vessels carrying products of other states but not on vessels carrying Maryland products); *Welton v. Missouri*, 91 U.S. 275 (1876) (license tax imposed on peddlers of out-of-state goods).

and brought into Alabama for disposal. There also is no doubt that such waste (whether hazardous or non-hazardous) is an article of commerce protected under the Commerce Clause. As this Court observed in holding that solid waste is an article of commerce, "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia v. New Jersey*, 437 U.S. at 622 (emphasis added). Thus, because it discriminates on its face against an article of interstate commerce, the Additional Fee must be subjected to "the strictest scrutiny"—a level of scrutiny that this Court's decision in *City of Philadelphia v. New Jersey* makes plain it cannot survive.

1. The unconstitutionality of the Additional Fee is established by *City of Philadelphia v. New Jersey*.

In *City of Philadelphia*, the Court held invalid under the Commerce Clause a New Jersey statute that barred the disposal within that State of waste generated in other states, while permitting unrestricted disposal of New Jersey waste. The Court explained that the Commerce Clause prevented New Jersey from "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-627. "Both on its face and in its plain effect," the New Jersey statute violated this "principle of nondiscrimination." *Id.* at 627.

The Court observed that "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the

other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U.S. at 629. The statute thus was "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause." *Ibid.*

The \$72 Additional Fee is indistinguishable from the statute held invalid in *City of Philadelphia*: it discriminates against out-of-state waste precisely because of the waste's state of origin.¹⁵ There can be no dispute that the purpose and effect of the Additional Fee are to discourage the disposal within Alabama of waste generated in other states (see pages 11-12, *supra*), while exempting from that burden waste generated within Alabama. That is precisely what *City of Philadelphia* forbids.

Despite *City of Philadelphia*'s clear holding, the Alabama Supreme Court found the facially discriminatory Additional Fee constitutional on two related grounds. First, the court stated that *City of Philadelphia*'s antidiscrimination principle does not apply if the discrimination is motivated by health and safety concerns. Second, it identified several legitimate state interests that it concluded could not be achieved by less discriminatory means. Neither of these rationales can save the Additional Fee, however.

¹⁵ The Alabama Supreme Court did not identify a reason "apart from [its] origin" to treat out-of-state waste differently than in-state waste. As the trial court found (Pet. App. 83a-84a), there simply is no such justification in the record in this case.

2. The Alabama Legislature's supposed nonprotectionist motivation provides no basis for distinguishing this case from *City of Philadelphia*.

The Alabama Supreme Court refused to apply *City of Philadelphia*'s anti-discrimination principle to the Additional Fee, reasoning: "*City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for 'simple economic protectionism.'" Pet. App. 42a.

This effort to avoid *City of Philadelphia*'s dispositive force is doubly misguided. In the first place, the state supreme court clearly erred in assuming that a heavy tax borne only by out-of-state manufacturers does not provide competing local manufacturers with a substantial competitive advantage. As a result of the Additional Fee, Alabama businesses that generate hazardous waste as a by-product of their manufacturing processes have significantly lower costs than otherwise identical out-of-state companies that are not fortunate enough to have one of the nation's safest hazardous waste disposal facilities in their home states.¹⁶ The use of a tax to raise out-of-state companies' costs of doing business is the essence of protectionism. See, e.g., *Boston Stock Exchange*, 429 U.S. at 330-331; *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891); *Walling*, 116 U.S. at 455.

Moreover, this Court's decisions expressly and conclusively reject the Alabama Supreme Court's "dis-

¹⁶ Whether or not this was an intended consequence of the Additional Fee is irrelevant. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports*, 468 U.S. at 270 (citations omitted).

inction" based on subjective legislative motivation. For example, in *City of Philadelphia* itself, New Jersey "den[ied] that [its statute] was motivated by financial concerns or economic protectionism" and contended that it was designed "to protect the health, safety and welfare of the citizenry at large." 437 U.S. at 626 (citation omitted). The Court found New Jersey's actual motive irrelevant, stating:

[I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. * * * But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627. The Court has reiterated this point on several occasions. See, e.g., *New Energy*, 486 U.S. at 279 n.3 (even if state legislature was motivated by a subjective purpose to protect public health, that purpose was "inadequate to validate patent discrimination against interstate commerce"); *Maine v. Taylor*, 477 U.S. 131, 148-149 n.19 (1986) (the *City of Philadelphia* standard applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade").¹⁷ Thus, the de-

¹⁷ The Alabama Supreme Court stated (Pet. App. 42a) that *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supported its reading of *City of Philadelphia*. In fact, that decision reaffirmed *City of Philadelphia*'s conclusion that "[a]

cision below simply cannot be reconciled with *City of Philadelphia*.

3. *The Additional Fee is not the least discriminatory means of achieving any legitimate governmental interest.*

There can be no doubt that Alabama's sole goal in enacting the \$72 fee was to obstruct the flow of interstate commerce into the State. The record is replete with evidence of this purpose. See pages 11-12, *supra*.¹⁸ However, respondents apparently have learned from their recent judicial experiences (see pages 8-10, *supra*) that a desire to close the State's borders to interstate commerce cannot save a discriminatory measure from invalidation under the Commerce Clause. They accordingly have advanced alternative justifications for the State's blatant discrimination here. The Alabama Supreme Court accepted these arguments, stating (Pet. App. 44a) that

court may find that a state law constitutes 'economic protectionism' on proof *either* of discriminatory effect or of discriminatory purpose." 449 U.S. at 471 n.15 (citations omitted; emphasis added).

¹⁸ During the course of this litigation, the State repeatedly has acknowledged the discriminatory purpose underlying the legislation. For example, during oral argument at the preliminary injunction stage, counsel for respondent Hunt admitted that the purpose of the Additional Fee was to "discourage other people from sending their hazardous waste down here * * *." J.A. 4. Similarly, in a letter to the trial court at the summary judgment stage, counsel for respondent Sizemore stated that CWM "correctly observes that the purpose of the \$72.00 additional fee is to discourage the shipment of dangerous waste materials to Alabama for permanent storage." R. 1341 (letter dated Aug. 29, 1990 from William D. Coleman to Hon. Joseph Phelps).

the Additional Fee promotes four legitimate purposes that could not be served adequately through less discriminatory means. As the United States observed in its amicus brief at the petition stage (at 8), each of the State's putative purposes "can effectively be served by non-discriminatory enactments" and therefore none "justify the Additional Fee requirement's discriminatory treatment of wastes generated out-of-state."

a. Health and safety. The first purpose identified by the Alabama Supreme Court is "protection of the health and safety of the citizens of Alabama from toxic substances." Pet. App. 44a. As the trial court expressly found, however (and the state supreme court did not dispute), "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states." *Id.* at 86a. Accordingly, to the extent the State deems the existing comprehensive federal and state regulatory regimes (see pages 3-6, *supra*) insufficient to protect public health and safety, the State's interest plainly can be served at least as well (and probably better) by additional nondiscriminatory disposal regulations or by a non-discriminatory per-ton tax applicable to *all* waste disposed of within Alabama. That is what this Court concluded with respect to the identical argument in *City of Philadelphia*, 437 U.S. at 629; accord *New Energy*, 486 U.S. at 279.¹⁹

¹⁹ An even-handed per ton tax is a complete answer to respondents' argument that the health and safety risks from out-of-state waste are greater because there is more of it. Such a tax fully takes into account differences in volume: most of the revenue generated will be from disposal of out-of-state waste if most of the waste disposed of comes from

Respondents argue that *Maine v. Taylor*, *supra*, supports their position, but that case is easily distinguishable. *Taylor* involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the strict scrutiny standard applicable to laws that discriminate against interstate commerce. It upheld the statute only because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" 477 U.S. at 152 (quoting *City of Philadelphia*, 437 U.S. at 627). Specifically, the out-of-state baitfish had a physical characteristic—the presence of parasites—that was "not common to wild fish in Maine." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow it effectively to exclude fish with parasites; existing sampling and inspection procedures simply were not adequate. *Id.* at 146. The Court for that reason upheld the statute.²⁰

Taylor thus rested squarely on this Court's determination that the record established that out-of-state baitfish were in fact different from and posed a substantially different threat to the environment than

out of state. There is no need for an additional, discriminatory fee to ensure that whatever category of generators disposes of the most waste also pays the most taxes.

²⁰ The State also argued that its ban was necessary because non-native species that could pose a threat to Maine's aquatic ecology might be inadvertently included in shipments of species that were already present in Maine. Recognizing that there was considerable evidence that Maine could ensure against importation of non-native species without resorting to a ban on importation of all baitfish, this Court limited its review to the State's interest in avoiding introduction of parasites. See 477 U.S. at 143 n.14.

in-state baitfish. Here, by contrast, the record reflects—and the trial court found—that out-of-state waste is *not* different from and does *not* pose a different threat than in-state waste. See pages 13-14, *supra*. *Taylor* is therefore inapplicable in this case.²¹

Respondent Sizemore labors mightily to mold *Taylor* to fit the present case. Citing the fact that "some" of the parasites in the *Taylor* baitfish had been found in Maine fish and that non-Maine fish could swim into Maine waters, Sizemore asserts that the Court did not rest its decision on the disparate environmen-

²¹ The quarantine cases referred to by respondents (Hunt Br. in Opp. 11 n.8; Sizemore Br. in Opp. 13-15 & nn. 6, 8) also are inapposite. As this Court has observed, those cases stand for the narrow proposition that a state may ban the importation of items "such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *City of Philadelphia*, 437 U.S. at 628-629. In contrast, the Additional Fee is not aimed at preventing the movement of hazardous waste "whatever [its] origin," but instead is directed solely at hazardous waste transported from other states for disposal in Alabama. The fee does not apply at all to waste generated in Alabama and transported to other parts of the State for disposal. Nor does it apply to waste transported through Alabama for disposal outside of Alabama.

Moreover, the quarantine rationale never has been applied outside the context of a flat ban on a particular item. The linchpin of the quarantine cases is the imminence of the threat to the public welfare posed by the banned item. When a State does not ban an item and will let in substantial amounts of that item as long as a hefty duty is paid, the notion that the Commerce Clause's antidiscrimination principle should give way is frivolous.

tal threat from out-of-state fish. In his view, *Taylor* stands for the proposition that a state may tax or regulate out-of-state foods that threaten public health without applying that tax or regulation to in-state goods that present the very same danger to public health. Supp. Br. 2-3.

Sizemore's discussion of the facts of *Taylor* omits one crucial ingredient. Two of the three parasites that were the focus of Maine's concern had *never* been detected in Maine baitfish. As a factual matter, therefore, the out-of-state baitfish were different from Maine baitfish. *United States v. Taylor*, 585 F. Supp. 393, 396 (D. Me. 1984). The substantially different threat to the environment posed by these parasites was critical to the Court's determination that the ban was constitutional. 477 U.S. at 141, 142-143.

Indeed, Sizemore's view of *Taylor* would mean that *Taylor* overruled *City of Philadelphia*, which rested on the determination that the out-of-state waste ban could *not* be justified by any health risk presented by solid waste precisely because that risk was no different from the risk from in-state waste. See 437 U.S. at 629. But *Taylor* plainly did not overrule *City of Philadelphia*. Rather, relying on the district court's factual findings, the Court upheld the Maine statute only because "Maine ha[d] legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" 477 U.S. at 152 (quoting *City of Philadelphia*, 437 U.S. at 627) (emphasis added)). That difference was the distinct environmental threat from the parasites in out-of-state fish. The factual finding that there is no difference between Alabama waste and out-of-state waste is thus fatal to respondents' purported health and safety justification.

b. *Conservation*. The second state interest invoked by the Alabama Supreme Court is "conservation of the environment and the state's natural resources." Pet. App. 44a. This conservation goal plainly may be achieved through an even-handed tax on all waste disposed of in Alabama regardless of origin. As this Court observed in rejecting an identical conservation justification in *City of Philadelphia*, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." 437 U.S. at 627. Accord *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *Hughes*, 441 U.S. at 337-338; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). That is precisely what Alabama's discriminatory tax is designed to do and precisely what it does.

The long-standing principle that states may not confer upon their residents a preferred right of access to privately owned natural resources is essential to the realization of the Framers' intention to make "our economic unit * * * the Nation" (*H.P. Hood & Sons*, 336 U.S. at 537). Allowing states to hoard such resources on behalf of their citizens would have disastrous consequences for our economic union:

If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. * * * To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

West, 221 U.S. at 255. Accordingly, just as New Hampshire may not hoard electricity generated with-

in the state (see *New England Power, supra*), Oklahoma may not hoard its minnows (see *Hughes, supra*), New Jersey may not hoard municipal waste disposal capacity (see *City of Philadelphia, supra*), and West Virginia and Oklahoma may not hoard natural gas (see *Pennsylvania v. West Virginia, supra*; *West, supra*), the Commerce Clause bars Alabama from seeking to "conserve" hazardous waste disposal capacity through a discriminatory tax on out-of-state waste.

c. *Compensatory revenue.* The Alabama Supreme Court's third justification for the discriminatory Additional Fee is that the fee provides "compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama." Pet. App. 44a. This rationale appears to combine two arguments raised by respondents in the courts below, neither of which justifies the discrimination.

One argument is that the fee is a means of ensuring that out-of-state generators contribute their fair share to any future response costs incurred by Alabama as a result of a natural disaster or other event causing a release of hazardous waste into the environment. It is undisputed, however, that the costs and burdens that Alabama might be forced to incur some time in the future as a result of a ton of hazardous waste that is disposed of today will not vary depending on the waste's state of origin. See J.A. 25-26 (testimony of ADEM official Sue Robertson). Accordingly, the State's desire to provide a financial safeguard against the assertedly uncertain future costs and burdens associated with the present disposal of hazardous waste—to the extent such a safeguard is necessary or even appropriate given the fed-

eral protections already in place (see pages 3-6, *supra*)—plainly can be satisfied through nondiscriminatory taxation or regulation of all hazardous waste disposed of in Alabama.²² Moreover, as the United States pointed out in its amicus brief at the petition stage (at 10-11), the state court's underlying assumption—that Alabama will be less able to recover future cleanup costs from out-of-state generators than from in-state generators—is unsupportable:

[F]ederal law provides the State with ample authority to impose the financial costs of cleaning up the Emelle Facility on the generators of the waste—both in-state and out-of-state. * * * Furthermore, it is far from certain that any particular in-state generator, currently exempted from the Additional Fee, will be in existence or located in Alabama when and if clean-up of Emelle is eventually required.

The other argument relating to "compensatory revenue" is that the Additional Fee serves to offset financial burdens imposed by Alabama on in-state generators that are not imposed on out-of-state generators. This Court has made clear, however, that a facially discriminatory tax will be upheld as a "compensatory tax" only if the tax merely counterbalances a "substantially equivalent" tax on intrastate activity. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). Comparing the Additional Fee to prop-

²² In fact, the Additional Fee does not provide a safeguard of any kind because the revenues are not set aside in an environmental emergency fund, but instead are "deposited into the general budgetary fund of the state to be used for general operations * * *." Ala. Code § 22-30B-3. Because Alabama is not operating at a surplus, revenues from the Additional Fee are expended soon after they are generated.

erty taxes, income taxes, sales taxes, and the like simply will not do. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 289 (1987) (“[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens’”) (citations omitted). As the trial court recognized (Pet. App. 88a n.6), Alabama never has identified a tax that falls exclusively on in-state waste and is “substantially equivalent” to the Additional Fee. Accordingly, the compensatory tax doctrine cannot justify that facially discriminatory fee.

d. *Transportation risks.* The final justification for the Additional Fee invoked by the court below is “reduction of the overall flow of wastes traveling on the state’s highways.” Pet. App. 44a. Of course, merely reducing the flow of goods in interstate commerce is not by itself a legitimate goal under the Commerce Clause. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677-678 (1981) (minimizing truck traffic on state’s highways is not a legitimate governmental interest).

A state could have a legitimate interest in seeking to minimize the risks associated with transportation of hazardous waste and to ensure the adequacy of funds to respond to any releases resulting from an accident during transportation. To the extent the extensive federal and state regulatory schemes described above (at pages 5-6) do not already fully address those goals, Alabama has at its disposal a range of nondiscriminatory approaches that do not

require it to resort to a facially discriminatory tax on waste disposal.

For example, the State could increase the stringency of its regulations on an even-handed basis. Alternatively, Alabama could impose an even-handed tax on the transportation of hazardous materials on Alabama roads. Such a tax would not only be non-discriminatory, it would also more effectively address the State’s putative transportation concerns by not exempting Alabama waste or waste that is being transported *through* Alabama. What Alabama may not do is force only interstate commerce to bear the burden of its asserted concern about transportation safety. See *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991) (invalidating flat fee for hazardous material transportation license and observing that a nondiscriminatory tax would be more rationally linked to the State’s safety purpose); *Illinois v. General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (Illinois’ failure to regulate intrastate shipment of waste and interstate shipments not for disposal within the State rendered argument based on alleged transportation risks “unconvincing”).

* * * * *

In sum, a discriminatory disposal tax is not necessary to address any of Alabama’s putative goals. The Court’s conclusion in *City of Philadelphia* is fully applicable here:

Today, cities [outside Alabama] find it expedient or necessary to send their waste into [Alabama] for disposal, and [Alabama] claims the right to close its borders to such traffic. Tomorrow, cities in [Alabama] may find it expedient or necessary

to send their waste into [other states] for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect [Alabama] in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

437 U.S. at 629. Any other result would eviscerate the concept of national economic union that lies at the heart of the Commerce Clause. Other states are contemplating discriminatory measures similar to Alabama's (AISI Br. 16); those measures will likely be adopted if Alabama prevails here. States with generators whose waste was effectively embargoed by Alabama (or by other states) might then try to retaliate against Alabama by adopting similar restrictions targeting the products of Alabama industry. The result would be the very economic warfare among the states that the Commerce Clause was intended to prevent.

Moreover, Alabama's contention that it is being burdened unfairly by interstate commerce in waste ignores the integrated nature of our economy. Cars used by the citizens of Alabama may have been manufactured in Michigan or Texas; the gasoline that powers those cars may have been refined in New Jersey or California. Those states bear any environmental burdens associated with the manufacturing process, while Alabama's citizens get the benefit of the finished products. See, e.g., AISI Br. 18-19 (discussing plight of Georgia metal plating company that generates hazardous waste in the process of producing products for use by an Alabama business). Similarly, it is more than a little ironic that although a company located in Alabama manufactured half of

the PCBs ever produced in the United States (Tr. 167 (testimony of Rodger Henson)) and shipped them in interstate commerce to other states, Alabama has persistently tried to prevent the disposal within the State of material contaminated with those same PCBs. See page 9, *supra*. The fundamental error of the decision below is its failure to recognize that waste, like every other article of commerce, may not be subjected to differential treatment on the ground that it is a product of Alabama or New York or California; all must be treated as products of the Nation.

Finally, as the United States pointed out in its amicus brief at the petition stage (at 11), the State's concerns may be presented to Congress as justification for national legislation regarding hazardous waste disposal. Congress already has provided the states with incentives to begin the process of siting additional hazardous waste disposal facilities. See 42 U.S.C. § 9604(c)(9), discussed in *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d at 716-717, 720. And Congress now is considering a range of options for addressing waste disposal issues, several of which would authorize the states to engage in disparate treatment of out-of-state hazardous waste. See Brief for National Solid Wastes Management Association as Amicus Curiae in Support of Petitioner at 29-30, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, No. 91-636 (filed Feb. 14, 1992). Indeed, an ADEM official has appeared before Congress to testify in support of such legislation. See *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Energy and Com-*

merce Comm., 102d Cong., 1st Sess. 101-143 (1991) (statement and testimony of Sue Robertson).

Alabama is not free to jump the gun, however. Unless and until Congress expressly authorizes disparate treatment, Alabama may not discriminate against out-of-state waste on the basis of its origin.

C. This Case Should Be Remanded To Allow The Alabama Courts To Address CWM's Entitlement To Retropective And Ancillary Relief.

For the foregoing reasons, the \$72 Additional Fee plainly violates the Commerce Clause. Alabama accordingly may not continue to enforce that levy and the state supreme court's determination that the tax is constitutional should be reversed. In addition, the case should be remanded to the lower court for consideration of CWM's claims for retrospective and ancillary relief. Cf. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 251-253 (1987).

First, under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Alabama must provide "meaningful backward-looking relief" to rectify the unconstitutional discrimination. *Id.* at 2247.²³ Although the Court has indicated that this requirement may be satisfied by either a refund or retroactive taxation of the favored class (see *id.* at 2252), it has cautioned that "retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limita-

²³ Because the invalidity of the Additional Fee is clear under long-settled constitutional principles, Alabama cannot argue that this Court's decision should apply only prospectively. *McKesson*, 110 S. Ct. at 2247 n.15.

tion,' depending on 'the nature of the tax and the circumstances in which it is laid.'" *Id.* at 2252 n.23 (citation omitted). Given the time that has elapsed since the Additional Fee took effect, any retroactive tax would violate due process in the circumstances presented here. In addition, in view of the fact that the tax is imposed on the operator of the facility, not the waste generator, and that CWM might not be able to pass on to its in-state customers the economic burden that was borne by CWM's out-of-state customers, any retroactive tax would "still in fact treat[] [out-of-state waste generators] worse than [generators of in-state waste] * * *, thereby perpetuating the Commerce Clause violation during the contested tax period." *Id.* at 2253.²⁴ Retroactive taxation accordingly is not a permissible retrospective remedy.

Second, a complete backward-looking remedy must address the effect of the discriminatory Additional Fee on the companion provision of Act No. 90-326 imposing a "cap" on the amount of waste that may be disposed of annually at the Emelle facility. The trial court correctly found in this case that the benchmark period for determining the volume limitation under the Cap Provision was tainted by the unconstitutional Additional Fee—the fee depressed receipts of out-of-state waste and therefore produced a lower volume limitation. See page 15, *supra*. See also Pet. 29 (discussing the impact of the Additional Fee

²⁴ Moreover, because of the potential inability of CWM to pass any retroactive tax through to its in-state customers, choice of that remedy would have the improper effect of penalizing CWM for seeking to vindicate its Commerce Clause rights by challenging the discriminatory Additional Fee.

on business at the Emelle facility). Indeed, that was Alabama's express purpose.²⁵

Courts have broad power to shape equitable relief to remedy fully the harm caused by a constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 281-282 (1977); *Lemon v. Kurtzman*, 411 U.S. 192, 200-201 (1973) (plurality opinion). As the United States concluded in its amicus brief at the petition stage (at 19), "[a] complete remedy for the effects of the impermissible Additional Fee should accordingly include some adjustment of the Cap Provision."²⁶

²⁵ As Governor Hunt stated:

When this bill was debated, some in the hazardous waste business warned that this would dramatically reduce dumping in Alabama. Good! That's what we want to do * * *. And if it is reduced, we're going to make sure it stays that way. An important provision in this bill will cap the amount of waste that can be dumped in Alabama at whatever amount is brought to the State over the next 12 months. In other words, if the new law cuts dumping from 800,000 tons to 100,000 tons, then that's going to be the limit on dumping in Alabama.

J.A. 66-67.

²⁶ This Court denied certiorari on the merits of the Commerce Clause challenge to the Cap Provision. But the Court's decision to let stand the lower courts' conclusion that the Cap Provision does not itself violate the Commerce Clause, like the lower courts' rulings themselves, plainly does not prevent the Alabama courts from adjusting the cap to provide a complete remedy for the discrimination effected by the Additional Fee.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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